SUPREME COURT, U.S.
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No. 02-

IN THE

Supreme Court of the United States

HUNTER SCHUEHLE,

Petitioner,

v.

GALE NORTON, Secretary, United States Department of Interior; JAMIE RAPPAPORT CLARK, Director, United States Fish & Wildlife Service; and SIERRA CLUB,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where notices of intent to sue have repeatedly been sent to water pumpers and members of a water permitting board threatening suit under the Endangered Species Act, may a water pumper who relies on permits from that board and is also a board member bring a declaratory judgment action to challenge the basis for the threatened suit, or is the action not "ripe" until the water pumper receives a separate notice in his individual capacity as a water pumper rather than a board member?

LIST OF PARTIES TO PROCEEDINGS BELOW

The caption contains all parties to the proceedings below except Texas State Representative John H. Shields, who is not a petitioner.

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Petitioner Hunter Schuehle respectively petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 289 F.3d 832 (5th Cir. 2002). The district court's opinion on the parties' cross motions for summary judgment (App. 11a) is unpublished.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 26, 2002. A petition for rehearing was denied on July 1, 2002. (App. 67a). This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B) ("ESA") provides in relevant part:

> (a) Generally
>
> (1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it shall be unlawful for any person subject to the jurisdiction of the United States to —
>
> (B) take any such species within the United States or the territorial sea of the United States . . .

The ESA defines a "take" at 16 U.S.C. § 1532(19) as follows:

> (19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8 of the Constitution provides as follows:

> Section 8. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Article III, Section 2 of the Constitution provides as follows:

> Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more states; between a state and citizens of another state; between citizens of different states; — between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

STATEMENT OF THE CASE

This case concerns the proper threshold standard for ripeness for a Commerce Clause challenge to an intrastate application of the Endangered Species Act.

I. The Edwards Aquifer is a Vital Resource for the Citizens of South Central Texas.

The Edwards Aquifer ("Aquifer") is located in the south central region of Texas. The Aquifer serves as the source of water for nearly 1.7 million people living in the region, and is also a major source of water for agriculture, industry, and wildlife in the area, including Petitioner Schuehle's agricultural endeavors. The Aquifer flows into the San Marcos and Comal Springs, which are home to several fish, amphibian and plant species that have been designated as "endangered" or "threatened" pursuant to the Endangered Species Act ("ESA"). Included among these species are the Fountain darter, the San Marcos salamander, the San Marcos gambusia, the Texas blind salamander, the Comal Springs dryopid beetle, the Comal Springs riffle beetle, and Texas wild-rice. All of these species ("Edwards species") are native to the area just downstream of the San Marcos and Comal Springs. They do not inhabit any land outside of this small area of Texas. They are not and have never been commercial product, and are not and have never been bought, sold, or exchanged.

Petitioner Schuehle is a resident of Medina County, Texas. He raises livestock and exotic animals on the Parker Creek Ranch, located in Medina County. Schuehle owns several parcels of farm land that rely on on-site Aquifer wells for irrigation and, until he received threats of litigation,

previously pumped Aquifer water to irrigate those sites. His wells are located approximately 100 miles from Comal Springs, and 80 miles from San Marcos Springs.

II. The Sierra Club and United States Fish and Wildlife Service Repeatedly Threatened Suit under the ESA against Aquifer Pumpers, and Have in Fact Sued.

The Aquifer depends on annual rainfall to replenish its water supply. It suffers diminished capacity during droughts, both because of the lack of rainfall and increased pumping by water users.[1] This diminished capacity results in reduced water flow to the San Marcos and Comal Springs, which has the potential to impact negatively the habitat of the Edwards species. The Sierra Club monitors the Edwards species. In 1990, and again in 1994, it sent a Notice of Intent to Sue letter to individuals and entities that pumped water from the Aquifer. It alleged in these letters that the water users' actions in pumping water from the Aquifer threatened the vitality of the Edwards species, and thus violated the ESA. In both letters the Sierra Club threatened to file suit.

The Sierra Club followed up on its threats with litigation. One suit filed by the Sierra Club, *Sierra Club v. Lujan*, 1993 WL 141353 (W.D. Tex. 1993), resulted in the district court entering judgment for the plaintiff.[2] As part of its

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1. The Sierra Club and the United States Fish and Wildlife Service ("FWS") have focused exclusively on the impact that groundwater pumping has on Aquifer levels.

2. On appeal, the court of appeals blocked water pumpers from challenging the application of the ESA to the Edwards species on standing grounds. In *Sierra Club v. Babbitt*, 995 F.2d 571 (5th Cir.

(Cont'd)

judgment, the court ordered the FWS to calculate the springflow level at which each of the Edwards species would be placed in jeopardy. It ordered the FWS to provide all Aquifer pumpers with a copy of its order. The FWS complied with the court's directive, and sent out two letters in 1993 to Aquifer pumpers that identified minimum springflow levels and notified pumpers that withdrawing water from the Aquifer that would cause springflow levels to drop below this minimum would result in a taking under the ESA, with

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(Cont'd)

1993), several appellant-intervenors attempted to continue an appeal of the district court's order requiring the FWS to set water level standards for the protection of the Edwards species. The court of appeals rejected the appeal for lack of jurisdiction, holding that the appellant–intervenors had not shown an injury from the district court order to the FWS. *Sierra Club*, 995 F.2d at 575. According to the court of appeals:

> [T]he judgment requires nothing of the appellants. Nor will the judgment affect the appellants in any future litigation, because the only issue necessarily decided by the district court is that *FWS* has a nondiscretionary duty to promulgate springflow information. The appellants cannot legitimately blame the judgment for causing any future litigation; the information ordered by the district court is in no wise a prerequisite to ESA-enforcement litigation.

Sierra Club, 995 F.2d at 575. While the FWS water level standards may not be a prerequisite to litigation, they have become the *de facto* standard by which the Sierra Club and the FWS have sought to impose liability. On every occasion since the establishment of FWS standards, the Sierra Club has threatened suit only after springflow levels have dropped below FWS standards.

resulting penalties.[3] Petitioner Schuehle received both letters from the FWS.[4]

3. Under the FWS standards, the minimum springflow levels resulting in "jeopardy" or a "take" are identical for some Edwards species, while for others, such as the Fountain darter, the threshold for causing "jeopardy" is lower than that for a "take." Under the ESA, a "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The ESA imposes significant civil and criminal penalties for any person who "knowingly takes" an endangered or threatened species. 16 U.S.C. §§ 1540(a), (b) (2000) (setting forth civil fines of up to $25,000 per take, and criminal penalties of up to $50,000 and one year imprisonment).

4. In its judgment, the *Lujan* court also issued an ultimatum to the Texas legislature; either the legislature would pass legislation to govern use of the Aquifer by May 31, 1993, or the court would take control of the Aquifer. In response, the state of Texas passed the Edwards Aquifer Authority Act, which provided authority for the creation of the Edwards Aquifer Authority ("EAA"). The EAA is a political subdivision of the State of Texas. Governed by a 17-member board of directors elected by popular vote, the EAA "facilitates the development and implementation of the operations and programs." During all times relevant to this litigation, Petitioner Schuehle has served as a member of the board and Treasurer of the EAA.

Pursuant to its legislative authority, the EAA requires all municipal, industrial and irrigation well owners to seek and obtain a groundwater withdrawal permit before they can use their wells to pump water from the Aquifer. The EAA is statutorily mandated to reduce pumping from the Aquifer, and carries out this mandate through reducing the number of permits issued and the amount of water allowed to be pumped out by water users. It does not directly base its pumping restrictions on the FWS standards, and its restrictions do not mirror the FWS standards. A pumper can be in full compliance with his permit and still be liable for a taking under the ESA if springflow levels drop below the minimum levels set by the FWS, as happened during the summer of 1998 when this suit was originally filed.

In 1996, as a result of a drought, springflow levels dropped below the minimum level required to maintain the habitat of the Fountain darter at Comal Springs, as set by the FWS. As a result, the Sierra Club filed a class action lawsuit against all Aquifer pumpers, including Petitioner Schuehle. The district court issued a preliminary injunction that severely restricted Aquifer pumping. On appeal, the Fifth Circuit vacated the preliminary injunction in that case on the basis of Buford abstention, and ruled that the EAA should handle the situation. *Sierra Club v. San Antonio*, 112 F.3d 789 (5th Cir. 1997), *cert denied*, 522 U.S. 1089 (1998).[5] In its order, the Fifth Circuit noted the dire impact the district court's injunction would have on the people who relied on the Aquifer for water.[6]

While the immediate legal threat to Aquifer pumpers was stayed by the Fifth Circuit's order, pumpers were again placed in peril in the summer of 1998, when springflow levels again dropped below the minimum level set by the FWS. On June 25, 1998, the *San Antonio Express-News* reported that "[f]ederal wildlife officials said Wednesday that they are ready to file civil lawsuits and even criminal charges to protect species in danger of dying because of the drought." The Sierra Club followed up on this statement by sending, on August 14, 1998, another Notice of Intent to Sue, directed to individual board members of the EAA, of which Petitioner Schuehle is a member. The Notice letter indicated that the

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5. The Court's denial of a petition for a writ of certiorari in that case came shortly before the summer 1998 drought and the Sierra Club's renewal of its threats of litigation towards Aquifer pumpers.

6. The Sierra Club has also filed other suits against Aquifer pumpers. *See Sierra Club v. Glickman*, 82 F.3d 106 (5th Cir. 1996); *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998).

Sierra Club intended to sue over takes of the Edwards species caused by "excessive pumping" from the Aquifer. It stated that such a lawsuit may be brought as part of a suit currently pending in federal district court in Texas, or as a new lawsuit, and that board members could be held liable under the ESA in their individual capacities.

III. Petitioner Schuehle Filed Suit Against the Sierra Club and FWS in Response to Direct Threats of Litigation.

On August 28, 1998, in response to this direct and immediate threat of litigation, Texas State Representative John A. Shields filed suit against the Sierra Club, Bruce Babbitt, Deputy Secretary of the United States Department of the Interior, and Jamie Rappaport Clark, Director of the FWS.[7] At the time Shields filed suit, Aquifer springflow had been below take levels for certain Edwards species for over a month. Shields' suit sought a declaratory judgment that the ESA was unconstitutional as applied by the Defendants because the species in question did not relate to or otherwise impact interstate commerce.[8] On November 19, 1998, Petitioner Schuehle joined the suit as a co-Plaintiff, and alleged the same claims as Shields.

The parties filed cross-motions for summary judgment. In addition to their substantive arguments, Defendants argued

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7. Gale Norton was substituted for Bruce Babbitt when she assumed the position of Secretary of the Department of the Interior in 2001.

8. The district court had subject matter jurisdiction over the case pursuant to 28 U.S.C. § 1331 because it involved a federal question.

to the district court that the litigation was not ripe because Schuehle had not actually been sued under the ESA. App. at 12a. The district court rejected Defendants' ripeness argument and found that the suit was ripe for adjudication. It then granted Defendants' motion for summary judgment.

The district court specifically recognized in its opinion that Schuehle had "curtailed his irrigation pumping on the Cole Dairy and Wurzbach properties to his financial detriment, in response to credible threats of either prosecution or litigation by the Sierra Club and FWS." App. at 31a. It went on to note that the Notices of Intent to Sue, which are the first step in the litigation process, were intended to and did serve as reminders to Schuehle that he, as an individual pumper, could not pump Aquifer water during minimum springflow levels without risking civil or criminal penalties under the ESA. Schuehle was thus required to modify his behavior in response to the notice letters. The court stated that "Schuehle should not be placed in the unenviable position that, in order to test the constitutionality of the ESA, he must expose himself to civil and criminal liability." App. at 32a.

After finding that Schuehle's suit was ripe for adjudication, the district court determined that Schuehle's claim was without merit, and that the Defendants' application of the ESA to Schuehle was constitutional. Schuehle appealed this decision to the Fifth Circuit. In their opposition brief, Defendants again raised their ripeness argument. The Fifth Circuit did not reach the substance of Schuehle's appeal. Rather, it determined that the litigation was not ripe. It vacated the district court's order and remanded with instructions to dismiss for lack of jurisdiction.

In its order, the Fifth Circuit reasoned that neither the 1990 or the 1994 Notice of Right to Sue letters were sufficiently concrete regarding whether Schuehle received the letters in his individual capacity. It also noted the time lapse between the lawsuit and those letters. The Fifth Circuit disregarded the 1998 Notice of Right to Sue letter because it ruled that Schuehle had received the letter not in his individual capacity but rather in his capacity as a board member of the EAA. It held that "whether the Sierra Club will sue Schuehle hinges upon contingencies not easily anticipated . . . " and that Schuehle's injury was nothing more than a possibility. App. at 9a.

REASONS FOR GRANTING THE PETITION

The dispute underlying this case involves a clash between the vital interests of land owners and Congress' power to protect endangered species. The court of appeals' disposition of this dispute on ripeness grounds is a departure from this Court's precedent and sets an artificial barrier to resolving an important constitutional conflict.

The court of appeals held that a pumper could not sue for a declaratory judgment that minimum water levels set by the FWS in order to protect plants and animals covered by the ESA were an unconstitutional application of Congress' power under the Commerce Clause because the issue was not ripe. The court of appeals based its decision on its finding that Petitioner Schuehle, a water pumper, who was also a member of the regulatory board that established the water restrictions in compliance with the ESA, had not been threatened with litigation for violating the ESA as an individual water user but only as a member of the water board. That ruling directly conflicts with this Court's standard for

ripeness in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Moreover, the court made this finding despite the fact that Schuehle had previously been sued as a member of the putative class of defendant water pumpers in *Sierra Club v. San Antonio, et al.*, Case No. MO-96CA097 (W.D. Tex. Midland/Odessa Division). Finally, Schuehle had modified his individual water use to his financial detriment in direct response to credible threats of litigation against water pumpers on at least three separate occasions. Under this Court's ruling in *Abbott*, Schuehle need not wait until he has been personally charged with criminal or civil penalties before he may challenge the FWS standards.

The expanded ripeness requirements set out in the court of appeals' decision, together with the enforcement mechanisms of the ESA, place the underlying interests of water users and endangered species in perpetual conflict: Standards for minimum springflow levels in the Aquifer, set by the FWS under its application of the ESA, affect literally millions of water users in the Aquifer when those standards are wielded by the Sierra Club as a basis to threaten and bring litigation against pumpers under the ESA's citizen suit provisions, 16 U.S.C. § 1450(g). Yet, following the court of appeals decision, water users are powerless to challenge the standards until water levels drop below the FWS standards and they individually receive notice that their water use may have contributed to the destruction of the Edwards species, which may result in civil or criminal penalties. This Court's precedents, however, hold that Petitioner Schuehle should not be forced into a high stakes game, risking litigation and the habitat of endangered species to settle this dispute. Certiorari is warranted in this case to reestablish this Court's precedent on standing and allow resolution of the underlying dispute on the merits.

A. Because Standing Is A Threshold Issue In Every Federal Case And A Prerequisite For Access To The Courts, A Failure To Follow This Court's Standing Jurisprudence Presents An Important Question.

"[W]hether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III . . . is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). This Court has developed a definitive test for determining whether a case or controversy exists so that this limitation on the power of the courts does not become an unreasonable obstacle to resolving disputes. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Court summarized the test as containing the following three elements:

> First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectual' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly . . . trac[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560-61 (citations omitted).

The doctrine of "ripeness" flows from the requirement that the plaintiff suffer "injury in fact" and bears on the issue of whether the harm has "matured sufficiently to warrant judicial intervention." *Warth*, 422 U.S. at n.10. In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the Court established that ripeness is determined by evaluating "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. An important element of the "fitness of the issues" is whether the courts would benefit from further factual development of the issue. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

Improperly dismissing cases on the grounds of ripeness needlessly and harmfully delays resolution of important issues. In this case, Schuehle seeks a declaratory judgment that the "take" provisions of the ESA are unconstitutional as applied to the Edward species because they exceed Congress' power under Commerce Clause. Schuehle questions whether the FWS can set water level standards, backed by the threat of litigation and penalties pursuant to the ESA, in defense of endangered plants and animals found entirely within the state of Texas with no connection to interstate commerce.

The facts of this case strongly suggest that application of Congressional power in this context directly contravenes this Court's recent holdings in *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995). In *Lopez*, the Court struck down the Gun-Free School Zones Act, holding that the connection between guns near schools and commerce was too attenuated to fall within Congress' Commerce Clause powers. The Court reaffirmed this holding in *Morrison* by invalidating parts of the Violence Against Women Act, which created a federal civil remedy

for gender-motivated violence. Both decisions enforced the constitutional doctrine of Enumerated Powers that limits the categories of activities that Congress may regulate pursuant to the Commerce Clause. *See Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 558. Under the inflated ripeness standard set by the court of appeals, Schuehle cannot test whether the FWS standards meet these requirements without risking litigation and potential harm to the Edwards species.[9]

B. The Court of Appeals' Standard For Ripeness Improperly Expands the Requirements for Standing.

The court of appeals' decision unnecessarily adds an additional requirement to the doctrine of ripeness, which improperly blocks resolution of this dispute. Under the court of appeals' holding, a plaintiff who is subject to a regulatory scheme must wait until he has been *individually* threatened

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9. The dispute over Congress' power to regulate solely intrastate endangered species is not unique to this case. In *Palila v. Hawaii Dep't of Land and Natural Res.*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd, Palila v. Hawaii Dep't of Land and Natural Res.*, 639 F.2d 495 (9th Cir. 1981), the Sierra Club and other non-profit organizations sued Hawaii's Department of Land and Natural Resources ("DLNR") under the ESA for declaratory and injunctive relief. The Sierra Club claimed that the DLNR's policy of maintaining feral sheep and goats in the habitat of the Palila, a native Hawaii bird and endangered species, was threatening the Palila to the point of extinction. The DNLR argued, among other things, that the application of ESA in this instance exceeded Congress' power under the Commerce Clause because the Palila did not move interstate and had no connection to commerce. In a one sentence conclusory statement, the district court upheld Congress' power to regulate the Palila under Commerce Clause, and noted *sua sponte* that Congress could also "assert a property interest in endangered species which is superior to that of the state." *Id.* at 995 and n.40.

with litigation before challenging the constitutionality of that scheme. App. at 8a-9a. In reaching this conclusion, the court of appeals discounted evidence that Schuehle was threatened with litigation through his partnership in 1990, and that in 1994, and again in 1998, Schuehle had received notice of the Sierra Club's intent to sue the EAA, of which he was a member. App. at 8a-9a. The court of appeals also improperly dismissed the district court's finding that Schuehle had curtailed his pumping from the aquifer to his financial detriment in direct response to these threats of prosecution. App. at 9a. Instead, the court of appeals seized on whether Schuehle was individually named in threatened litigation as the primary factor for determining whether the case was ripe. App. at 8a.

The court of appeals' hyper-technical requirement for ripeness departs dramatically from this Court's established precedent. In *Abbott*, this Court heard arguments that new regulations promulgated by the Commissioner of Food and Drugs, which required drug manufacturers to disclose additional information on their labels, exceeded the scope of the Commissioner's authority. The additional information required drug manufacturers to make significant changes to their business practices and incur considerable expense to insure they were in compliance. The FDA could impose stiff civil and criminal penalties on drug companies in noncompliance with the new regulations. Abbott Laboratories and other drug manufacturers brought a declaratory action challenging the regulations *before* they had altered their labling process, arguing that they should not have to await the imposition of fines in order to challenge the regulations. This Court agreed and held that the case was ripe for adjudication. *Abbott*, 387 U.S. at 151-56.

In support of this determination, the *Abbott* Court reasoned that "[w]here the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the . . . Declaratory Judgment Act must be permitted . . ." *Id.* at 153. The Court noted that the *Abbott* plaintiffs faced a dilemma "that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Id.* at 152. The regulation in question required plaintiffs to comply immediately with the new requirements or follow their current course of business and risk prosecution. *Id.*

The facts of the case at bar present this Court with an identical dilemma. Petitioner Schuehle must either comply with the FSW's restrictive standards and cease pumping to his financial detriment, or continue pumping pursuant to his previous course of business and risk civil and criminal penalties. As in *Abbott*, Schuehle is faced with the very type of dilemma which the Declaratory Judgment Act was designed to ameliorate. *Id.*

This Court has consistently held that " '[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.' " *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985), *quoting Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974), and *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). A case is typically ripe if the remaining questions are legal ones and no further factual development is required. *Thomas*, 473 U.S. at 581. Indeed, in cases such as this, "[n]othing would be gained by postponing a decision, and the public interest would be well served by a prompt resolution of the constitutionality" of the standard. *Thomas*, 473 U.S. at 582.

Here, Schuehle already has suffered "harm in fact." Schuehle's water rights, as well as the water rights of others on the Aquifer, continuously are affected by water restrictions imposed as a result of the minimum water levels set by the FWS. Schuehle has stopped pumping water on two of his ranches because of the threat of litigation. Moreover, delaying a resolution of the case will not produce any additional relevant facts. The standards for water levels in the Aquifer have been established since April 1993 and may be "enforced" without any further governmental action. App. at 31a. The FWS water levels have become the de facto basis for liability, and have served as the Sierra Club's trigger for threatening to commence, and in fact commencing, litigation during the droughts of 1996 and 1998. *See Sierra Club v. San Antonio*, Case No. MO-96CA097 (W.D. Texas). By requiring a party to be threatened with litigation in his individual capacity prior to bringing a declaratory suit, the court of appeals forces water users to pump more water out of the Aquifer and violate the FWS standards to invite suit and possible civil and criminal penalties. This suit is ripe for adjudication, and should be heard without further delay.

C. The Court of Appeals' Ripeness Standard Has Particularly Dire Consequences in Cases Involving the Endangered Species Act.

As noted above, unless the constitutionality of the FWS water level standards is resolved now, before the next drought or water shortage, Schuehle and other water uses on the Edwards aquifer will be faced with the unenviable position of respecting the water restrictions and allowing their land to dry up, or ignoring the standards and risking civil and criminal penalties. That is not the only dilemma improperly created by the court of appeals' new ripeness standards.

Ironically, to meet the court of appeals' standard for ripeness, Schuehle and others will be required to provoke litigation by continuing to pump water from the aquifer past the levels set for the protection of the Edwards species. Thus, to validate Congress' power to protect endangered species, Schuehle and others may be forced to put those species at risk.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED APRIL 26, 2002

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

No. 00-50839.

John H. SHIELDS; Hunter Schuehle,

Plaintiffs-Appellants,

v.

Gale NORTON, Secretary, United States Department of Interior; Jamie Rappaport Clark, Director, United States Fish & Wildlife Service; Sierra Club,

Defendants-Appellees.

April 26, 2002.
Rehearing Denied July 1, 2002.

Appeal from the United States District Court for the Western District of Texas.

Before JOLLY, HIGGINBOTHAM and PARKER, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Appendix A

Hunter Schuehle pumps water from the Edwards Aquifer in Texas. He challenges the constitutionality of the Take Provision of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B), as applied to the endangered and threatened species living at San Marcos and Comal Springs. Schuehle seeks a declaration that the Take Provision exceeds Congress' power under the Commerce Clause. The district court granted summary judgment to Appellees Gale Norton, Jamie Rappaport, and the Sierra Club, concluding that the Take Provision was a valid exercise of Congress' enumerated powers. These rulings followed the district court's decision that Schuehle has standing and the case is ripe. We are persuaded that this suit does not present justiciable issues and the district court was without jurisdiction to decide the case.

I

The Take Provision, Section 9(a)(1)(B) of the ESA, makes it unlawful for any person to "take" a listed species. To "take" a species is defined by the ESA as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a member of a listed species. To "harm" is defined by regulation to mean "an act which actually kills or injures wildlife."[1] Violation of the Take Provision can result in civil penalties of up to $25,000 for each knowing violation, criminal penalties of up to $50,000 and imprisonment for up to one year.

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1. 50 C.F.R. § 17.3.

Appendix A

The Secretaries of Commerce and the Interior jointly administer the ESA through the National Marine Fisheries Service and United States Fish and Wildlife Service. The Secretary of the Interior has statutory authority to promulgate regulations listing and defining the critical habitats of species that are either endangered or threatened.[2] This action triggers specific protections for the listed species and their defined habitat.[3] The Edwards Species at issue in this case are rare fish, amphibian, and plant species found only in the San Marcos and Comal Springs area of Texas. They are not purchased, sold, or exchanged commercially.

The Edwards Aquifer, a 175-mile long underground aquifer, is recharged from surface waters and rainfall seeping through porous earth. Water from the aquifer is used by thousands of farmers to irrigate millions of dollars worth of crops, by over two million people as their primary source of water, and by thousands engaged in business in Central Texas. The aquifer is also important to the Edwards Species.

The aquifer is regulated by the Edwards Aquifer Authority. Schuehle at relevant times was both a member of the board and a pumper of water from the aquifer.

II

This suit alleges that Appellees have threatened to sue area water pumpers for ESA violations based upon the theory that the pumping of water from the Edwards Aquifer harmed

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2. 16 U.S.C. §§ 1533, 1536.

3. 16 U.S.C. § 1536(a)(2).

the Edwards Species and is a "take" for purposes of the ESA. On January 27, 1999 Judge Hippo Garcia dismissed Shields and transferred the case to Judge Lucious Bunton. Judge Bunton concluded that the case was ripe for review and that Schuehle had standing. On the merits he granted summary judgment, holding that in enacting the Take Provision, Congress validly exercised its Commerce Clause and treaty powers. Finally, he rejected the contention that the ESA citizen suit provision unlawfully delegated authority. Shields and Schuehle appeal.

III

Article III of the Constitution confines federal courts to the decision of "cases" and "controversies." A case or controversy must be ripe for decision, meaning that it must not be premature or speculative.[4] That is, ripeness is a constitutional prerequisite to the exercise of jurisdiction.[5]

A suit for declaratory relief, while allowing a party to anticipate a suit and seek a judicial resolution, must nevertheless meet this keystone limitation. In hornbook form, a declaratory action must be ripe in order to be justiciable, and is ripe only where an "actual controversy" exists.[6]

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4. *United Transportation Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000).

5. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967).

6. 28 U.S.C. § 2201(a) ("In a case of actual controversy within its jurisdiction. . . .")

Appendix A

An actual controversy exists where "a substantial controversy of sufficient immediacy and reality exists between parties having adverse legal interests."[7] Ordinarily whether particular facts are sufficiently immediate to establish an actual controversy yields answers on a case-by-case basis.[8] Whether a declaratory action is ripe, by its very structure, pushes against our insistence upon mature disputes. That is, it "contemplate[s] an *ex ante* determination of rights that exists in some tension with traditional notions of ripeness."[9]

The district court found that "[a]lthough the ripeness determination is a close one," Schuehle's action was ripe for review.[10] The district court relied heavily upon evidence that Schuehle has curtailed his irrigation pumping to his financial detriment, in response to threats of prosecution and litigation by Appellees.[11] The district court found that the ESA "effectively imposes immediate obligations on Edwards pumpers" and concluded that "Schuehle should not be placed in the unenviable position that, in order to test the constitutionality of the ESA, he must expose himself to civil

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7. *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 896 (5th Cir. 2000).

8. *Id.*

9. *Orix*, 212 F.3d at 896 (*quoting Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 692 (1st Cir.1994)).

10. Op. at 15.

11. *Id.* at 14.

and criminal liability."[12] The court noted that the Sierra Club sent Schuehle notices of intent to sue, holding that the letters constituted "more than an imaginary threat to his ability to continue pumping."[13]

IV

The threat of litigation can establish a justiciable controversy if it is specific and concrete.[14] We look to the practical likelihood that a controversy will become real.[15] Because no action may be commenced under the citizen suit provision of the ESA until sixty days after written notice of the violation has been given to the alleged violator,[16] the district court properly determined that Notices of Intent to Sue sent by the Sierra Club in 1990, 1994, and 1998 are "the first step required in the litigation process" and were sent to induce the recipient to modify his actions so to avoid violation of the ESA.[17]

The district court cited two letters sent from the Sierra Club to "individuals and entities . . . withdrawing or diverting

12. *Id.* at 15.

13. *Id.*

14. *Orix*, 212 F.3d at 897.

15. *Id.*

16. 16 U.S.C. § 1540(g)(2)(A).

17. Op. at 14.

water from the Edwards aquifer, alleging that such actions constituted violations of the ESA."[18] The first letter, sent on April 12, 1990, stated that the cumulative impact of the pumping threatened the Edwards Species, alleged violations of section 9 of the ESA, and stated its intention to file suit if necessary to correct these violations.[19] The second letter, sent on April 15, 1994, stated that the actions of the pumpers "pose[d] a substantial and imminent threat of jeopardy to the continued existence of endangered and threatened species and to the public health and safety of 1.5 million people."[20] This letter also alleged violations of section 9 of the ESA, and stated that the Sierra Club would "take prompt legal action to obtain judicial remedies for this emergency."[21]

When he first joined this suit, Schuehle did not make it clear whether he was suing in his official capacity as a member of the Edwards Aquifer Authority Board or as an individual pumper. Schuehle conceded that he lacked authority to sue on the EAA's behalf, and the district court properly held that Schuehle lacked standing to sue in his official capacity.[22] The question before us, then, is whether there is a specific and concrete threat of litigation against

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18. Op. at 5-6.

19. Op. at 6.

20. *Id.*

21. *Id.*

22. Op. at 16.

Schuehle in his individual capacity sufficient to render his declaratory action an actual controversy and thus ripe for judicial review.

A notice of intent to sue Schuehle individually as distinguished from the board could be a sufficiently specific and concrete threat. But Schuehle has not demonstrated that he received such a notice. We are persuaded that neither the 1990 letter nor the 1994 letter are sufficiently specific and concrete. The 1990 letter lists Schuehle's partnership but not Schuehle in his individual capacity. Schuehle does not claim that the letter was directed to him. Rather he suggests that he may have received the letter from a third party. The 1994 letter does not list Schuehle, his partnership, or the EAA. Schuehle says only that he received it "directly or indirectly." Attributing the letter to the partnership as effective to Schuehle individually is of no moment. Significantly, more than four years lapsed before Shields filed this suit that Schuehle later joined. Moreover the Sierra Club by letter disclaimed any plan to sue Schuehle individually. While alone it is also of little import, such a disclaimer reenforced by these years of inaction hollows any "threat," and pulls it short of immediate.

The Sierra Club also sent a letter in 1998 but it was addressed solely to the EAA and its board members in their official capacities and Schuehle has no legal right to sue on behalf of the EAA. Pursuant to the ESA, the Sierra Club would be required to send Schuehle a notice letter at least sixty days before it could bring a suit against him.[23]

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23. 16 U.S.C. § 1540(g)(2)(A).

Appendix A

V

We are constrained to conclude that the Sierra Club's actions directed toward Schuehle were not a sufficient threat of litigation. If it is to be found, the requisite threat must be inferred from past litigation by the Sierra Club against other pumpers and from a 1988 newspaper article that quotes a United States Fish and Wildlife Service employee stating that "law enforcement is always an option" if the Edwards Species are harmed. But this is not enough.

It does not establish a specific, concrete threat of immediate litigation sufficient to establish the controversy requisite to declaratory judgment. Whether the Sierra Club will sue Schuehle hinges upon contingencies not easily anticipated, given that it is unclear from the record whether Schuehle pumps a significant amount of water from the aquifer, whether he has a permit from the EAA to do so, or specifically how he responded to any of the "threats." Schuehle's claim that he stopped pumping water from the aquifer in response to these "threats" in itself might establish a controversy, if not for their emptiness exposed by years of inactivity since the alleged "threats" were made and the lack of evidence that a threat was in fact made against Schuehle but not carried out because of his conforming conduct.

In short, we have some saber rattling, but nothing more, and we are left with the unease that proceeding to the merits is more likely than not the offering of one answer to a hypothesis — a possible but not sufficiently possible injury. This is where a court of limited jurisdiction must stop. We must decide the difficult questions when deciding a case

or controversy requires us to do so. At the same time, we must not proceed until the issue is ripe — until we have that case or controversy.

It follows that the district court erred in finding the requisite actual controversy. We VACATE its judgment and REMAND with instruction to dismiss the amended complaint for lack of jurisdiction.

APPENDIX B — ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT DATED AND FILED JULY 12, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MO-99-CA-040

JOHN SHIELDS and HUNTER SCHUEHLE

Plaintiffs

v.

BRUCE BABBITT, Secretary, United States Department of the Interior, JAMIE RAPPAPORT CLARK, Director, THE SIERRA CLUB

Defendants

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

BEFORE THE COURT are Plaintiff Hunter Schuehle's Motion for Summary Judgment[1] filed March 6, 2000, Federal Defendants' Motion for Summary Judgment filed February 23, 2000 and Defendant Sierra Club's Motion for Summary Judgment filed March 6, 2000 in the above referenced case.

1. Only Hunter Schuehle remains a plaintiff in this case. Plaintiff John H. Shields's claims were dismissed by a court order filed January 27, 1999.

Appendix B

In this action, Plaintiff Hunter Schuehle seeks a declaration that the "take" provisions of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538(a)(1)(B), as applied to the endangered and threatened species living at or immediately downstream of San Marcos and Comal Springs (the "Edwards species") is unconstitutional. Schuehle contends that Congress has no authority to regulate the Edwards species pursuant to the Commerce Clause, Article 1, section 8, clause 3 of the United States Constitution, because such regulation involves purely intrastate activity. Schuehle further claims that the Sierra Club's enforcement of the ESA's take provision through the ESA citizen suit provision is an unconstitutional delegation of authority to a private entity.

Federal Defendants Bruce Babbitt and Jamie Rappaport Clark and argue that the Edwards species do affect interstate commerce, that Plaintiff's claims are not ripe for adjudication because no legal action has been instigated against him, and that until such tune, Plaintiff has no standing to seek a court order to stop enforcement of the ESA. Defendant Sierra Club contends that the constitutionality of the ESA as applied to the Edwards species has already been established in other litigation, that the ESA may be constitutionally applied to the whole intrastate species within the reach of the interstate commerce clause and that the Edwards species both generate interstate commerce and themselves move in interstate commerce. The Sierra Club further maintains that Schuehle lacks standing to bring this suit either in his official capacity or his individual capacity and that his claim is not ripe. Finally, Sierra Club maintains that Schuehle has not demonstrated that he has been harmed by the Sierra Club's alleged threats of suit and that Schuehle's claim of improper

delegation has no merit because only Congress, or possibly the Department of the Interior, has the authority to delegate rulemaking.

This Court held a hearing on the parties' respective motions on April 3, 2000. After due consideration of the pleadings and accompanying evidence, the Court is of the opinion that Federal Defendants' and Sierra Club's respective motions for summary judgment should be granted and Plaintiff's motion for summary judgment should be denied, for the reasons set forth below.

Background

Congress' overriding goal in enacting the Endangered Species Act of 1973, 16 U.S.C.A. §§ 1531-1544, is to promote the protection and, ultimately, the recovery of endangered and threatened species. *Wyoming Form Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1237 (10th Cir. 2000) (citing H.R. Conf. Rep. No. 97-835, 97th Cong., 2d Sess. at 30 (1982), reprinted in 1982 U.S.C.C.A.N. 2860, 2871) ("In enacting the Endangered Species Act, Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element. Although the regulatory mechanisms of the Act focus on species that are formally listed as endangered or threatened, the purposes and policies of the Act are far broader than simply providing for the conservation of individual species or individual members of listed species.")); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (noting that the plain intent of Congress in enacting the Endangered Species Act

was to halt and reverse the trend toward species extinction, whatever the cost); *Catron County Bd. of Com'rs, New Mexico v. United States Fish and Wildlife Serv.*, 75 F.3d 1429,1437 (10th Cir. 1996) (identifying ESA's core purpose as prevention of the extinction of species by preserving and protecting the habitat upon which they depend from the intrusive activities of humans); *Village of Kaldovik v. Watt*, 689 F.2d 222, 233 (D.C. Cir. 1982) (recognizing environmental protection as the sole objective of the Endangered Species Act).

One of the purposes of the Endangered Species Act is to enforce international agreements designed "to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction." *United States v. Bernal*, 90 F.3d 465, 467 (11th Cir. 1996) (citing 16 U.S.C. § 1531(a)(4); *Tennessee Valley Auth.*, 437 U.S. at 184).

The Secretaries of Commerce and the Interior jointly administer the ESA through the National Marine Fisheries Service and United States Fish and Wildlife Service ("USFWS"). The ESA instructs the Secretary of the Interior to promulgate by regulation a list of those species that are either endangered or threatened, and to define the critical habitat of these species. *See* 16 U.S.C. §§ 1533, 1536 (1985 & Supp. 2000). Once a species is listed and a critical habitat is designated, specific substantive and procedural protections are accorded to that species and its habitat. *See* 16 U.S.C. § 1536(a)(2) (1985).

The take provision, § 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B) (1985), makes it unlawful for any person to

"take" any listed species without a permit or authorization. The term 'take as defined in the ESA means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (1985). The ESA imposes substantial civil and criminal penalties, including imprisonment, for "any person" who knowingly "takes" an endangered or threatened species, in violation of § 9(a)(1)(B). 16 U.S.C. §§ 1540 (a), (b) (1985 & Supp. 2000) (authorizing civil fines of up to $25,000 per violation and criminal penalties of up to $50,000 and imprisonment for one year).

The fish, amphibian and plant species which are the subject of this litigation have been listed by the USFWS as "endangered" or "threatened" pursuant to the Endangered Species Act ("ESA"). These species include the fountain darter (*Etheostoma fonficola*), the San Marcos salamander (*Eurycea nana*), the San Marcos gambusia (*Gambusia georgi*), the Texas blind salamander (*Typhomolge athbuni*), the Comal Springs dryopid beetle (*Stygompamus comalensis*), the Comal Springs riffle beetle (*Heterelmis comalensis*),[2] and Texas wild-rice (*Zizania texana*) (collectively, "the Edwards species"). The Edwards species are located entirely within the state of Texas. The Edwards species are native to only

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2. Plaintiff's First Amended Complaint for Declaratory Judgment identities only the fountain darter, San Marcos salamander. San Marcos gambusia, the Texas blind salamander and Texas wild rice as Edwards species listed under the ESA. The Comal Springs dryopid beetle and the Comal Springs riffle beetle are also listed as endangered. 50 C.F.R. § 17.11 (2000). The Sierra Club states in its August 14, 1998 letter to the Edwards Aquifer authority that these two species are found at one or both of the spring ecosystems (Comal and San Marcos).

one very small area in the South Central Texas region — at or just downstream of San Marcos and Comal Springs, the primary spring outlets for water in the Edwards aquifer.

The Edwards Aquifer is dependent on annual rainfall for recharge. During droughts, springflow from the Edwards Aquifer can become almost the sole source of flow downstream into the Guadalupe River. According to the Sierra Club and the USFWS, the natural flow of the San Marcos and Comal springs is vital to the continuing existence of the Edwards species. During dry periods, pumping from the Edwards Aquifer increases and flow from the Springs correspondingly decreases, sometimes to critical levels. This alters the aquatic habitat, causing "takes" of the Edwards species listed under the ESA, and reduces the flow of surface water downstream. Extremely low or nonexistent flow from the Springs places the Edwards species in "jeopardy."[3]

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3. The ESA also contains a jeopardy provision, as follows:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee . . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C.A. § 1536(a)(2) (1985). The constitutionality of the jeopardy provision is not specifically challenged in this litigation.

Appendix B

Plaintiff Hunter Schuehle lies and raises livestock and exotics, such as zebra, Axis deer and Fallow deer, on the Parker Creek Ranch in Medina County, Texas south of the town of D'Hanis. Schuehle has lived in Medina County for 50 years, is a former county official and is currently serving as an elected member of the Board of Directors of the Edwards Aquifer Authority ("EAA"). Schuehle represents District 12, which comprises the western part of Medina County. Schuehle also serves as Treasurer for the EAA Board of Directors. The EAA, a political subdivision of the State of Texas, was established by the Texas Legislature in 1993 pursuant to the Edwards Aquifer Act.[4] The EAA is a regional regulatory authority that has jurisdiction over groundwater withdrawals from the Edwards aquifer. Although Schuehle serves in an official capacity with respect to the EAA, the EAA itself is not a plaintiff in this suit and Schuehle does not allege that he represents the EAA in any capacity in this litigation.

Schuehle owns several parcels of property on which Edwards aquifer wells are located: (1) the Cole Dairy in Bexar County; (2) the Wurzbach property in Medina County; and (3) the Frio River Ranch in Uvalde County. The Cole Dairy and Wurzbach properties have Edwards Aquifer wells that have been historically used for irrigated farming. The Edwards well on the Frio River Ranch is used for domestic and livestock purposes.

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4. Act of May 30, 1993, 73rd Leg., R.S., ch. 626, §1.06, 1993 Tex Gen. Laws 2355, as amended by Act of May 79, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Sess. Law Serv. 2505 ("Edwards Aquifer Act").

Appendix B

The Sierra Club sent two Notice of Intent to Sue letters dated April 12, 1990 and April 15, 1994 to individuals and entities (including federal agencies) withdrawing or diverting water from the Edwards aquifer ("the Edwards pumpers"), alleging that such actions constituted violations of the ESA.[5] In the April 12, 1990 letter, the Sierra Club stated that the cumulative impact of such actions threatens to destroy federally designated critical habitat and imperils the well being of certain endangered and threatened species. In the April 15, 1994 letter, the Sierra Club stated that the Edwards pumpers' actions and refusals to act cause severe overdrafting of the Edwards Underground River, and in turn "poses a substantial and imminent threat of jeopardy to the continued existence of endangered and threatened species and to the public health and safety of 1.5 million people." In both letters, the Sierra Club attributed alleged violations of section 9 of the ESA to the non-federal agency pumpers.[6] In the April 12,

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5. The Sierra Club also sent a Notice of intent to Sue dated August 14, 1998 letter to the Chairman, General Manager and Board Members of the Edwards Aquifer Authority, stating that the "springs, the quality of water in the Edwards Aquifer, and the threatened and endangered species dependent on spring flows from the Edwards are needlessly at risk and suffering harm because of excessive pumping caused by the EAA. Schuehle received the August 14, 1998 letter in his capacity as EAA Board Member. The EAA is not a plaintif in this case, however, and the letter is not directed to Schuehle or any of the other Edwards pumpers in their individual capacities. Consequently, the August 14, 1998 is not relevant for purposes of this suit.

6. The April 15, 1994 letter states, "The Federal Violators, the [Texas Natural Resources Conservation Commission], and the City of San Antonio and other individuals and entities who withdraw water from

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1990 letter, the Sierra Club stated its intention to file suit under the authority of section 12(g) of the ESA, 16 U.S.C. § 1540(g), if litigation were necessary, to correct such violations. In the April 15, 1994 letter, the Sierra Club stated that it planned to "take prompt legal action to obtain judicial remedies for this emergency."

The USFWS sent letters to the Edwards pumpers (including Schuehle) dated March 4, 1993 and April 28, 1993 regarding *Sierra Club v. Lujan*, No. MO-91-CA-069, 1993 WL 151353 (W.D. Tex. Feb. 1, 1993). In *Sierra Club v. Lujan*, the plaintiffs contended that continued, unregulated pumping of water from the Edwards Aquifer harms various endangered species residing in and near the Comal Springs and San Marcos Springs. In that suit, this Court required the USFWS to determine the springflow requirements to avoid a taking or jeopardy of the listed species in both Springs. *Id.* at *33. The Court entered judgment and issued findings of interim minimum springflows, determined that certain endangered species were "taken" within the meaning of the ESA Whenever springflows drop below a certain flowrate as a result of withdrawals from the Edwards Aquifer,[7] and ordered

(Cont'd)
the Edwards Aquifer . . . have violated and are violating ESA § 9 by authorizing, funding or carrying out pumping, or by authorizing, funding or carrying out activities that allow, maintain, encourage or increase pumping, from the Edwards to an extent that reduces Edwards levels and Comal and San Marcos springflow rates to below the points of which endangered wildlife are actually killed or injured."

7. U.S. Fish and Wildlife Service determination of minimum springflows in cubic feet per second (cfs) needed to prevent take, jeopardy, or adverse modification of critical habitat are as follows:
(Cont'd)

the USFWS to provide all persons and entities withdrawing water from the Edwards with a copy of the Court's judgment. *Id.* at *34. In the March 4, 1993 letter, the USFWS encouraged Edwards pumpers to take necessary water conservation measures and to collectively work to provide a system of ground water management. The USFWS further noted that the Court found that excessive pumping of the Edwards Aquifer could result in contamination of the aquifer and could permanently and irreversibly ruin the aquifer. In its April 28, 1993 letter, USFWS identified springflow levels currently believed necessary to avoid a taking of listed species, and stated that "[a]ny withdrawal of water from the Edwards aquifer that would cause the springflow levels to drop below these identified levels could contribute to a taking of listed species in violation of the Endangered Species Act unless a [§ 10(a)] permit authorizing the "take" has been

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Species	*Take*	*Jeopardy*	*Adv. Mod.*
Fountain darter (Comal)	200	150	N/A
Fountain darter (San Marcos)	100	100	100
San Marco gambusia	100	100	100
San Marcos salamander	60	60	60
Texas blind salamander (San Marcos)	50	60	N/A
	Damarte and Destruction		
Texas wild-rice	100	100	100

San Marcos & Comal Springs & Associated Aquatic Ecosystems (Revised) Recovery Plan, U.S. Fish & Wildlife Service — 1996, Table 2 at 17.

obtained." In its June 25, 1993 letter, USFWS notified the Edwards pumpers of minimum springflow levels currently believed necessary to avoid jeopardy, destruction or adverse modification of critical habitat for the Edwards species and damage and destruction of Texas wild rice.

In 1996, Corral Springs Flow was as low as 83 cubic feet per second (cfs) during the month of August, and averaged below 100 cfs for the months of July and August. In 1998, Comal Springs Flow was as low as 168 cfs during the month of August, and averaged below 200 cfs for the month of July. William M. Seawell, Assistant Field Supervisor for USFWS Austin regional office, stated in his February 10, 2000 deposition that he was accurately quoted as stating the following:

> We're looking at possible enforcement options and hopefully gaining some cooperation from some of the pumpers to try to limit the speed at which the aquifer is being drawn down.
>
> Law enforcement is always an option. We certainly don't want to pursue that option, but we're getting forced into a position where we may have to.
>
> We're discussing the situation with law enforcement people and with our lawyers right now, and we'll take whatever action is appropriate.
>
> Civil suits are possible, as well as criminal charges against major pumpers if any members of the [Edwards species] are found dead.

Appendix B

Affidavit of William M. Seawell at 64-66. Plaintiff Schuehle was aware that during the summers of 1996 and 1998, springflows at Comal Springs fell well below "take" levels for the fountain darter at Comal Springs. Under these conditions, according to the Sierra Club and USFWS' interpretation of the ESA, pumping from the Edwards Aquifer is a violation of § 9(a)(1)(B) of the ESA. Schuehle claims that because of the numerous threats of ESA prosecution for pumping groundwater from the Edwards aquifer and the ESA lawsuits involving the Edwards species, he reduced his irrigation pumping from the Edwards wells on The Cole Dairy and Wurzbach properties, then completely quit irrigating his farmland on the Cole Dairy and Wurzbach properties with Edwards water.

In *Sierra Club v. San Antonio*, No. MO-96-CA-97 (W.D. Tex. 1996), a case currently pending before this Court, defendant Southwest Research Institute moved to dismiss arguing that the ESA as applied to the Edwards species is unconstitutional because the Edwards Aquifer and the Edwards species exist entirely within the state of Texas and the Commerce Clause only gives Congress the authority to regulate interstate activities. Also in that case, John Shields (a plaintiff who has been dismissed in the instant case) sought to intervene based, *inter alia*, on the fact that he uses water from the Edwards. Shields also sought to file a counterclaim alleging that the ESA, as applied to the Edwards and Edwards dependent endangered Species, is unconstitutional because neither is connected to interstate commerce. The Court heard testimony as to the Edwards' species effect on interstate commerce in that case and set forth its reasoning in Orders filed on August 9, 1996 and August 21, 1996 as follows:

Appendix B

At the August 1, 1996 hearing, the Court heard substantial evidence that the San Marcos and Comal Springs and the endangered species that inhabit them affect interstate commerce. David Whatley, former director of the City of New Braunfels Parks and Recreation Department testified that people come from out-of-state to observe the endangered species.

. . .

Tom Brandt, Acting Director of the San Marcos Fish Hatchery and home to endangered Fountain Darters and Texas Blind Salamanders, testified that he gives tours to out-of-state scientists and other interested visitors of the hatchery.

Clark Hubbs, Professor Emeritus of Zoology at the University of Texas at Austin, testified that the University conducts field trips to the San Marcos and Comal Springs so that visiting professors and students from outside the state of Texas, and in some cases, outside the United States, may observe the endangered species. Hubbs also testified that before the ESA was enacted, Fountain Darters were captured and sent to museums and aquariums around the world. Unlike *Palila*,[8] where the court held that the commerce clause was satisfied by the possibility

8. *Palila v. Hawaii Dep't of Land and Natural Resources*, 471 F. Supp. 985, 995 (D. Haw. 1979).

> of interstate movement of species and persons, there is substantial evidence before this Court that people do travel in interstate commerce to view these endangered species.
>
> Moreover, there are numerous agricultural pumpers taking water to irrigate their crops from the Edwards. It seems inconceivable to Court that all of the crops irrigated with Edwards water are consumed entirely within the boundaries of this state, for these reasons, the Court is of the opinion that the endangered species, as well as their habitat, substantially affect interstate commerce. . . .

Sierra Club v. San Antonio, Order of Aug. 9, 1996, at 3-4 and Order of Aug. 21, 1996, at 5-6. In the instant case, the federal defendants attach the sworn testimony of David Whatley, Tom Brandt, and Clark Hubbs as summary judgment evidence. Additionally they attach a copy of an affidavit of Tiff E. Barton, legal assistant to Sierra Club's counsel, which was also submitted in *Sierra Club v. San Antonio*. Mr. Burton states that he personally visited Aquarena Springs in San Marcos, Texas on July 31, 1996 and observed the Endangered Species exhibit here, at which displays, photographs and brochures were available. Mr. Barton observed roadside billboard advertising the exhibit, observed several vehicles at Aquarena Springs with out-of-state and foreign license plates, and personally talked to visitors from Mexico who were there to see the exhibit. Also bolstering Sierra Club's argument that regulation of the Edwards species would have a substantial effect on interstate commerce, is

the affidavit of economist M. Ray Perryman, introduced in *Sierra Club v. Lujan* as well. Perryman estimated that pumping restrictions could affect spending in Bexar County by as much as 9.5 billion dollars and also would result in the loss of up to 135,000 permanent jobs in Bexar County.

The Sierra Club attached as summary judgment evidence copies of two U.S. Fish and Wildlife Service Endangered Species Permits issued by USFWS in Albuquerque, New Mexico for the Edwards species. The first permit, issued to Southwest Texas State University, authorizes the furnishing of live Texas blind salamanders to the San Marcos National Fish Hatchery and Technology Center in San Marcos, Texas, the Dallas Aquarium and the Cincinnati Zoo. The second permit, issued to the Columbia Environmental Research Center in Columbia, Missouri, authorizes scientific research to be conducted on fountain darters. The Sierra Club also submitted as evidence a letter and a Federal Fish and Wildlife Permit/Application by Dallas Zoo requesting to amend the Dallas Zoo/Dallas Aquarium existing fountain darter Endangered Species Permit by adding the Texas blind salamander and the Barton Springs salamander. The permit already in place allows fountain darters to be maintained and displayed at the Dallas Aquarium.

Schuehle, the federal defendants and the Sierra Club are in agreement that there are no genuine issues of material fact in this case. Schuehle challenges the take provision of the ESA, 16 U.S.C. § 1538(a)(1)(B), claiming it is unconstitutional as applied to the Edwards species. The central issue for determination by this Court is whether Congress has the authority to regulate the Edwards species,

found exclusively within the borders of the state of Texas, pursuant to its power to regulate interstate commerce conferred by the Commerce Clause of the United States Constitution.

Standard* of *Review

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Guthrie v. Tifco Industries*, 941 F.2d 374 (5th Cir. 1991). The moving party bears the initial burden of showing that there is no genuine issue for trial; it may do so by pointing out the absence of evidence supporting the nonmoving party's case. *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 913 (5th Cir.), *cert. denied*, 506 U.S. 832 (1992) citing *Latimer* v. *Smithkline & French Lab.*, 919 F.2d 301,101 (5th Cir. 1990); *Celotex*, 477 U.S. at 425. The court may only grant the motion after drawing all inferences from the facts in favor of the party resisting the motion. *Boazman v. Economics Lab., Inc.*, 537 F.2d 210, 213-14 (5th Cir. 1976); *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990), *cert. denied*, 510 U.S. 859 (1993).

Summary judgment is appropriate in cases "where the underlying facts are undisputed and the record reveals no evidence from which reasonable persons might draw conflicting inferences about these facts." *Smith v. Mobil Corp.*, 719 F.2d 1313, 1315 (5th Cir. 1983), quoting *Bertrand v. Int'l Mooring and Marine, Inc.*, 700 F.2d 240, 244

(5th Cir. 1983). Because there is no dispute as to the underlying material facts in this case, the court resolves the issue presented by the application of legal principles to specific underlying facts. *Bertrand*, 700 F.2d at 244 (additional citations omitted).

DISCUSSION

I. *Justiciability of Schuehle's Claim*

Schuehle seeks a declaratory judgment that federal defendants may not enforce the ESA against him because the Edwards species are beyond the reach of Congress' powers under the Commerce Clause. When considering a declaratory judgment action, a district court must initially determine whether the declaratory action is justiciable. *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 2000 WL 633419, *3 (5th Cir. (Tex.)). Typically, this becomes a question of whether an "actual controversy" exists between the parties to the action. *Id.* (citing *Rowan Cos. v. Griffin*, 876 F.2d 26, 27-28 (5th Cir. 1989). As a general rule, an actual controversy exists where "a substantial controversy of sufficient immediacy and reality [exists] between parties having adverse legal interests." *Orix Credit*, 2000 WL 633419, *4 (citing *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir. 1986)).

The federal defendants and the Sierra Club both argue that Schuehle's challenge to the constitutionality of the ESA is not ripe for adjudication unless and until the federal government actually instigates enforcement action against

him. Schuehle has not alleged that any enforcement action has yet been taken against him. The Sierra Club also challenges Schuehle's standing to bring the suit.

A. Ripeness

A declaratory judgment action must be ripe in order to be justiciable. *Orix Credit*, 2000 WL 633419, *4 (citing *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000) ("Declaratory judgments are typically sought before a completed 'injury-in-fact' has occurred . . . but still must be limited to the resolution of an 'actual controversy.' ")). *See also Martin Tractor Co. v. Federal Election Comm'n*, 627 F.2d 375, 379 (D.C. Cir. 1980) ("ripeness is in part an expression of the court's inherent discretion when declaratory or injunctive relief is sought"). In *New Orleans Public Serv., Inc. v. Council of New Orleans*, the Fifth Circuit set out the prevailing standards for determining whether a dispute is ripe for adjudication:

> A court should dismiss a case for lack of "ripeness" when the case is abstract or hypothetical. Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 105 S. Ct. 3325, 3333, 87 L. Ed. 2d 409 (1985); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588-89, 92 S. Ct. 1716, 1719-20, 32 L. Ed. 2d 317 (1972).
>
> The key considerations are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.

> Ct. 1507, 1515, 18 L. Ed. 2d 681(1967); Placid Oil Co. v. Federal Energy Regulatory Commission, 666 F.2d 976, 981 (5th Cir. 1982).
>
> A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required. Thomas, 105 S. Ct. at 3333.

New Orleans Public Serv., Inc. v. Council of City of New Orleans, 833 F.2d 583, 586-87 (5th Cir. 1987). *See also Orix Credit*, 2000 WL 633419, *3.; *United Transp. Union*, 205 F.3d at 857.

Defendants argue that, since Schuehle has not been sued pursuant to § 9 of the ESA for "taking" Edwards species, his as-applied challenge to the constitutionality of that statute is not ripe for review. Indeed, Defendants argue, there is no indication that the ESA will ever be applied to Schuehle in the context of the Edwards species.

Additionally, Sierra Club produced an letter to Schuehle dated March 30, 2000, from its counsel Stuart N. Henry, stating that "to the extent the notice of intent to sue letters of April 12, 1990 and April 15, 1994 are treated as indicating an intent to sue you as a pumper for violations of the Endangered Species Act, Sierra Club hereby rescinds and withdraws those notices as to you, and only as to you." Defendants rely on this letter to bolster their contention that this suit is not ripe. Sierra Club's afterthought attempt to moot Schuehle's claims is ineffective, however, because a change of activity by a defendant under the threat of judicial

scrutiny is insufficient to negate the existence of an otherwise ripe case or controversy. *Armster v. United States Dist. Court for Centr. Dist. of Cal.*, 806 F.2d 1347, 1357 (9th Cir. 1986) (citing *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953)).

Three of the key cases Defendants cite for the proposition that an "as-applied" challenge is not ripe for review until the government actually applies the law to the claimant in the complained-of manner can be distinguished from the instant case. In *Hadel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 297 (1981), the court held that a takings issue was unripe because the potential for administrative solutions still existed. Here, no such alternative solutions exist. The Court's determination awaits no agency action. Either it is or it is not constitutional for § 9 to be applied to Schuehle, and his civil and criminal liability for pumping water from the Edwards wells directly hinges on the Court's determination. At issue in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989) is whether civil sanctions under the RICO statute are so severe as to render the statute unconstitutional. The *Fort Wayne* court held that issue to be unripe because the state had not sought any civil penalties, and stated that the issue could be reviewed only when remedies were enforced against the defendant. It had not yet been established whether the *Fort Wayne* defendant's actions even constituted a RICO violation, however. In the case at bar, Schuehle does not challenge on summary judgment either USFWS's determination of minimum springflows needed to prevent take, jeopardy, or adverse modification of critical habitat or the fact that withdrawals from the Edwards Aquifer can contribute to takes when springflows are at their minimum levels. Thus, further pumping by Schuehle at

minimum springflow conditions arguably does cause a violation of the take provision and sets the stage for government enforcement of the ESA against him. In *Elde v. Sarasota County*, 908 F.2d 716, 724-26 (11th Cir.), *cert. denied*, 498 U.S. 1120 (U.S. 1990), the court held that a zoning decision cannot be the subject of an as-applied challenge until the decision to apply the regulation to the plaintiff's property has been made. By contrast, in the instant case, the decision by the Sierra Club to "take prompt legal action to obtain judicial remedies for this emergency" had been made, as stated in its April 15, 1994 letter.

Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review. *United Transp. Union*, 205 F.3d at 857 (citing *Abbott Lab. v. Gardner*, 387 U.S. 136 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977)). Schuehle has curtailed his irrigation pumping on the Cole Dairy and Wurzbach properties to his financial detriment, in response to credible threats of either prosecution or litigation by the Sierra Club and USFWS. The Sierra Club Notices of Intent to Sue, the first step required in the litigation process,[9] served to remind Schuehle of his obligation to refrain from withdrawing Edwards water during minimum springflow levels, to avoid violation of the ESA. In *United Transportation Union*, the Fifth Circuit found a claim challenging a statute requiring the equipping and use of certain signaling devices on locomotives to be ripe, in the context of a pre-enforcement

9. No action may be commenced under the citizen suit provision of the ESA prior to Plaintif giving a 60 day notice of intent to sue under the ESA. *See* 16 U.S.C. § 1540(G)(2)A).

review, because it imposed immediate obligations on the railroad, including potential equipment modifications and operating modifications, 205 F.3d at 855-56, 858. In the instant case, when springflow is at minimum levels, the ESA effectively imposes immediate obligations on Edwards pumpers such as Schuehle to reduce or altogether cease their pumping activities or risk civil litigation and/or criminal penalties.

The issues presented in this case are fit for judicial decision because the Sierra Club has litigated previous ESA violations by the Edwards pumpers and their Intent to Sue letters to Schuehle demonstrate the viable threat posed to him if he resumes his normal pumping activities. Schueble should not be placed in the unenviable position that, in order to test the constitutionality of the ESA, he must expose himself to civil and criminal liability. One challenging a statute must demonstrate that he is immediately injured or jeopardized by its operation. *International Tape Mfrs. Assn v. Gerstein*, 494 F.2d 25, 28 (5th Cir. 1974). An official's threat to enforce the statute against the plaintiff may be enough to create ripeness if the plaintiff alleged he had engaged, was engaging or desired to engage in the prohibited activity. *Id.* (citations omitted). A specific threat of enforcement is not mandatory, but plaintiffs must somehow demonstrate that the statute poses more than an imaginary threat to their well-being. *Id.* (citation omitted). It is uncontroverted that Schuehle has engaged in pumping from the Edwards Aquifer and desires to continue this activity. Further, Sierra Club's threat of suit against Schuehle in light of their previous actions demonstrate more than an imaginary threat to his ability to continue pumping.

Pre-enforcement review is especially appropriate in this case because of the significant and continual economic harm that Schuehle may suffer if the Court withholds review on ripeness grounds. *See United Transp. Union*, 205 F.3d at 859. Thus, Schuehle's claims satisfy the hardship prong set forth in *New Orleans Public Service.*

Finally, the only questions this Court needs to decide in this case — the constitutionality of § 9 as applied to Schuchle and whether the Sierra Club's use of the citizen suit provision of the ESA constitutes an invalid delegation of legislative policy-making authority — are purely legal ones. Thus, they are appropriate for judicial review. *Id.* (citing *New Orleans Pub. Serv.*, 833 F.2d 583). Although the ripeness determination is a close one, this Court concludes that this case is ripe for judicial review, for the reasons cited.

B. Standing

The Sierra Club takes issue with Schuehle's failure to identify in which capacity he is suing — in his official capacity as a member of the Edwards Aquifer Authority Board or as an Edwards pumper in his individual capacity, asserting that he lacks standing in either capacity. Although Schuehle characterizes himself as both "EAA Board Member Hunter Schuehle" and "a pumper and consumer of Edwards water" in his First Amended Complaint, he has admitted in his response to Requests for Admissions that he has not been authorized by the EAA to sue on its behalf, Schuehle points to no provision in the EAA statute that would authorize an individual member to act on behalf of the EAA Board. The real party in interest in an official capacity suit is the entity

represented and not the individual officeholder. *Karcher v. May*, 484 U.S. 72, 78 (1987). Schuehle's status as an EAA board member does not permit him to "step into the shoes of the Board" and invoke its right to bring a lawsuit on EAA's behalf. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 (1986). Therefore, the Sierra Club is correct that Schuehle lacks standing to sue in his official capacity.

Regarding standing to sue in his individual capacity, Schuahle owns the Cole Dairy, Wurzbach property and Frio River Ranch, all of which contain water wells which have historically pumped water from the Edwards Aquifer for various uses, including domestic, livestock and agricultural purposes. Schuehle pumped Edwards water to irrigate his Cole Dairy and Wurzbach properties, then reduced his irrigation pumping due to the Sierra Club's Notice of Intent to Sue letters, the USFWS letters and newspaper accounts outlining USFWS' intentions to enforce the ESA requirements. Schuehle's affidavit is unclear regarding whether he continues to pump from the Edwards wells for non-irrigation purposes.

Defendants contend that Schuehle's claims fail to satisfy the standing requirements imposed by the "case" or "controversy" provision of Article III because he suffered no concrete or particularized injury. This "irreducible constitutional minimum" of standing requires: (1) that the plaintiff have suffered an "injury in fact" — an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of — the injury must

be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). The uncontroverted summary judgment evidence demonstrates that Schuehle received irrigation water from the Edwards Aquifer for his Cole Dairy and Wurzbach properties, and that the determination of minimum springflow levels determined by USFWS adversely affected him by ultimately causing him to decide to substantially reduce his irrigation activities. Defendants contend that these facts fail to satisfy the "injury in fact" element of Article III standing because Schuehle has not demonstrated that he is being harmed in performing his pumping. Further, they claim, Schuehle fails to allege that the Sierra Club provided him as an Edwards pumper with the requisite 60 day notice under the ESA that the intention is to sue him under the Act. Therefore, the Sierra Club contends, he is not even threatened with legal action.

The USFWS determination of springflow requirements to avoid a taking or jeopardy constituted notice to Schuehle and other Edwards pumpers that additional pumping would result in a violation of the ESA if springflow levels were at their minimum. Schuehle has been adversely affected as a result, because he was not then free to pump without civil and criminal liability. The specific facts that support his injury are his economic loss resulting from curtailing and ceasing his pumping activities. Schuehle therefore provides sufficient facts to establish the requisite injury in fact. Schuehle's injury

is "fairly traceable" to the USFWS's determination of springflow requirements. It is "redressable" by a favorable judicial ruling, because he will not be liable for any "taking" of Edwards species should the Court hold § 9 of the ESA unconstitutional.

In addition to civil fines, the ESA provides criminal penalties for those individuals found in violation of the statute. A credible threat of imminent prosecution can injure the threatened party by putting him between a rock and a hard place — absent the availability of preenforcement review, he must either forego possibly lawful activity because of his well-founded fear of prosecution, or willfully violate the statute, thereby subjecting himself to criminal prosecution and punishment. *Navegar, Inc. v. United States*, 103 F.3d 994, 998 (D.C. Cir. 1997) (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979)). In such situations the threat of prosecution provides the foundation for justiciability as a constitutional and prudential matter, and the Declaratory Judgment Act, 28 U.S.C. § 2201 (1994), provides the mechanism for seeking preenforcement review in federal court. *Navegar*, 103 F.3d at 998-99 (citing *Steffel v. Thompson*, 415 U.S. 452, 480 (1974) ("the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity"). In this case, threats of enforcement by the Sierra Club and the USFWS simultaneously ripen Schuehle's preenforcement challenge and gives him standing. *See Navegar*, 103 F.3d at 998.

Having decided that this case is justiciable, the Court now proceeds to the merits of Schuehle's claims.

II. Constitutionality of the Take Provision of the ESA as Applied to the Edwards Species

The United States Constitution grants Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The regulated activity at issue in this case is "takes" of the Edwards species as that term is used in § 9(a)(1)(B) of the ESA and the regulation adopted pursuant to the ESA. Schuehle alleges that the ESA cannot apply to protect species that are native to the Edwards Aquifer because the regulated activity at issue is not "commercial" in nature and it is an entirely intrastate activity. He further contends that Congress has made no finding that takes of endangered species have a substantial effect on interstate commerce. Finally, he argues that, as applied to the Edwards species, the regulated activity significantly intrudes into areas of traditional state authority: groundwater ownership and regulation, wildlife management, and land use.

As previously discussed, this Court has previously addressed the constitutionality of the ESA as applied to the Edwards endangered species in *Sierra Club v. San Antonio*, No. MO-96-CA-97 (W.D. Tex. 1996). In that case, this Court aligned itself with the court in *Palila v. Hawaii Dept. of Land and Natural Resources*, 471 F. Supp. 1204 (D. Haw. 1979) in holding that the FSA may apply to protect such species if they substantially affect interstate commerce of some kind, even if the species are not bought or sold across state lines. The *Palila* court found that the ESA could protect the Palila bird, an endangered bird found only within Hawaii, because of interstate interest in viewing the species:

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> Congress has determined that protection of any endangered species anywhere is of the utmost importance to mankind, and that the major cause of extinction is destruction of natural habitat. In this context, a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction.

Palila, 471 F. Supp. at 994-95 (citing *Brown v. Anderson*, 202 F. Supp. 96 (D. Alaska 1962) (indirectly supporting the proposition that federal power over wildlife derives from the interstate movement of persons utilizing or studying wildlife)). *Palila* thus concluded that the Tenth Amendment does not restrict enforcement of the Endangered Species Act, because of the power of Congress to regulate commerce. *Palila*, 471 F. Supp. at 995.

This Court also based its decision in *Sierra Club v. City of San Antonio* on the principles enunciated in *Utah v. Marsh*, 961 F.2d 1310, 1319 (10th Cir. 1984). In *Marsh*, the court found that the plaintiffs discharge of dredged or fill material into Utah Lake, located entirely within the state, could well have a substantial economic effect on interstate commerce because, *inter alia*, waters from Utah Lake are used to irrigate crops which are sold in interstate commerce; the take also provides recreationists with the opportunity to observe, photograph, and appreciate a variety of bird and animal life;

and non-resident visitation at the lake has averaged 2% of total visitation. *Marsh*, 740 F.2d at 803-04. The *Marsh* court noted that such interstate movement of travelers has been held to be within the reach of the Commerce Clause. *Id.* at 804. In *Sierra Club v. San Antonio*, this Court found that, among other things, that persons travel from out of state to study and observe the Edwards species. Unless subsequent persuasive authority to the contrary exists, this Court sees no reason to depart from its conclusion set forth in *Sierra Club v. San Antonio* that the ESA is a constitutional exercise of Congressional authority.

A. The Three-Pronged Lopez Test, the Rational Basis Requirement and the Aggregation Principle

Schuehle contends that the conclusion the take provision exceeds Congress Commerce Clause authority is consistent with *United Slates v. Lopez*, 514 U.S. 549 (1995), a case pre-dating this Court's ruling in *Sierra Club v. Son Antonio. Lopez* recognized limits to the reach of the interstate commerce clause by holding that holding that Gun-Free School Zones Act, making it federal offense for any individual knowingly to possess firearm at a place that an individual knows or has reasonable cause to believe is a school zone, exceeded Congress' commerce clause authority, since possession of gun in local school zone was not economic activity that substantially affected interstate commerce. *Lopez*, 514 U.S. at 567. *Lopez* set forth the three broad categories of activity that Congress may regulate consistent with the commerce clause. "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the

instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59 (citations omitted).

In *Wickard v. Filburn*, 317 U.S. 111, 124 (1942), the Supreme Court found that the effect of consumption of home grown wheat had a substantial effect on interstate commerce, thus making its regulation by Congress appropriate. Since *Wickard* was decided, the Supreme Court has undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce. *Lopez*, 514 U.S. at 557 (citing *Hodel*, 452 U.S. at 276-280; *Perez v. United States*, 402 U.S. 146, 155-156 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964); *Heart of Atlanta Motel, Inc. v. United State*s, 379 U.S. 241, 252-253 (1964)).

In *United Stares v. Knutson*, 113 F.3d 27 (5th Cir. 1997), the Fifth Circuit considered whether a federal law prohibiting the transfer or possession of machine guns exceeded Congress' power under the Commerce Clause. The Court recognized the three categories of activity that Congress may regulate under the Commerce Clause identified in *Lopez*, and applied the "rational basis" principle to the "substantial effect" category. *Knutson*, 113 F.3d at 29. The Court found the statute constitutional because Congress could have had a rational basis for concluding that the statute regulates conduct that has a substantial effect on interstate commerce. *Id* at 31.

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The Fifth Circuit farther refined the application of the *Lopez* analysis in assessing whether Congress acted constitutionally in enacting a particular statute, as applied to interstate activities, in *United States v. Robinson*, 119 F.3d 1205, 1214-15 (5th Cir. 1997). In *Robinson*, a defendant convicted under the Hobbs Act of conspiracy and aiding and abetting three robberies challenged the constitutionality of the Act, which assesses criminal penalties for interference with interstate commerce by a robbery, an act of extortion, or an attempt or conspiracy to rob or extort. *Id.* at 1208, 1215. The *Robinson* court stated:

> [U]nder the third category of the commerce power described in Lopez, the particular conduct at issue in any given case need not have a substantial effect upon interstate commerce. Congress is free to act — and the government to apply the law — so long as the regulated activity, in the aggregate, could reasonably be thought to substantially affect interstate commerce.

Id. The *Robinson* court found that the defendant's as-applied challenge to the Hobbs Act collapsed in the face of the aggregation principle, even though individual instances of the regulated activity may not have substantially affected interstate commerce. *Id.* at 1215. However, the class of activities analysis set forth in *Robinson* must be read in the context of a prosecution under the Hobbs Act, a statute providing for an interstate commerce nexus. *United States v. Bird*, 124 F.3d 667, 677 n.12 (5th Cir. 1997); *see Robinson*, 119 F.3d at 1213 (jurisdictional element explicitly limits the scope of the Hobbs Act to those robberies and extortion schemes which affect interstate commerce).

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Since this Court's Aug. 9, 1996 order was entered in *Sierra Club v. San Antonio*, two circuit courts of appeals have addressed the constitutionality of the ESA: *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (holding that the ESA can protect a species that lives in only one state, by virtue of the national interest in biodiversity and other factors) and *Gibbs v. Babbitt*, 2000 WL 793941, *6 (4th Cir. (N.C.)) (finding that a USFWS regulation limiting the taking of red wolves on private land pursuant to its authority under the ESA is within the reach of congressional authority under the Commerce Clause). Also, the Supreme Court decided another case that further defined the outer limits of the commerce clause, *United States v. Morrison*, __ U.S. __, 120 S. Ct. 1740 (2000) (holding that Commerce Clause did not provide Congress with authority to enact civil remedy provision of Violence Against Women Act, inasmuch as provision was not regulation of activity that substantially affected interstate commerce). In light of *National Association of Homebuilders*, *Gibbs*, *Morrison*, and *Lopez* — as interpreted by the Fifth Circuit in *Robinson* and *Bird*, the Court now revisits the issue of whether Congress has the authority to regulate the Edwards species pursuant to the Commerce Clause.

B. Evaluating the Take Provision by Applying the Lopez Categories of Activity

In this instance, analysis under two of three *Lopez* categories (one and three) is appropriate. *Lopez* category two does not apply because section 9(a)(1) of the ESA is not a regulation of the instrumentalities of interstate commerce or of persons or things in interstate commerce. *National Ass'n*

of Home Builders, 130 F.3d 1046 (rejecting notion that endangered species of fly found only in California was "thing in interstate commerce," in action challenging constitutionality of "taking" provision of ESA). Although Edwards species are captured, shipped to and traded among various museums and zoos, this is not sufficient to make the them instrumentalities or things in interstate commerce. *See Gibbs*, 2000 WL 793941, *5 (4th Cir. (N.C.)) (rejecting conclusion that endangered red wolves are things in interstate commerce, notwithstanding that they were transported interstate for the purposes of study and reintroduction programs). *See also Lopez*, 514 U.S. at 559 (rejecting application of *Lopez* prong two to Gun-Free School Zones Act, despite the fact that the regulated guns likely traveled through interstate commerce).

The Court now focuses on the remaining *Lopez* categories of activity — channels of interstate commerce and substantial effect on interstate commerce. In evaluating whether ESA section 9(a)(1) is a regulation of the use of the channels of interstate commerce or of activity that substantially affects interstate commerce, we may look not only to the effect of the extinction of the individual endangered species at issue in this case, but also to the aggregate effect of the extinction of all similarly situated endangered species. *Id.*

a. Channels of Interstate Commerce

National Ass'n of Home Builders identifies two reasons why the power of Congress to regulate the channels of interstate commerce provides a justification for section

9(a)(1) of the ESA: First, the prohibition against takings of an endangered species is necessary to enable the government to control the transport of the endangered species in interstate commerce. 130 F.3d at 1046. One of the most effective ways to prevent traffic in endangered species is to secure the habitat of the species from predatory invasion and destruction. *Id.* at 1047. Therefore, section 9(a)(1) of the ESA can be properly upheld as a regulation of the use of the channels of interstate commerce. *Id.*

Second, the prohibition on takings of endangered animals falls under Congress' authority " 'to keep the channels of interstate commerce free from immoral and injurious uses' " *Id.* at 1046 (citing *Lopez*, 514 U.S. 558, in turn quoting *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 256 (1964)). In the instant case, Congress used its authority to rid the channels of interstate commerce of injurious uses to directly regulate "takes" of endangered species. By conferring authority on the Secretary of the Interior to develop a recovery plan for the conservation of such species,[10] Congress indirectly regulates the conditions under which irrigation water is used to produce crops for sale or other use in interstate commerce. Congress used this authority to prevent the eradication of endangered species by persons whose economic activity threatens their habitat, such as Edwards pumpers who draw down the Springs by excessive water withdrawals. Edwards pumpers use water from the Edwards

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10. The Secretary of the Interior is directed to develop and implement recovery plans for the conservation and survival of endangered species and threatened species listed pursuant to the ESA, unless he finds that such a plan will not promote the conservation of the species. 16 U.S.C.A. § 1533(f)(1) (2000).

Aquifer to irrigate crops which are sold in interstate commerce or which are consumed and otherwise used within the state of Texas. Under *Wickard's* aggregation principle, the regulated intrastate activity is of an apparent commercial character and is also subject to federal regulation under the Commerce Clause. *Morrison*, 120 S. Ct. at 1750 n.4. Thus, regulations preventing the taking of endangered species prohibit interstate actors from using the channels of interstate commerce to "promot[e] or spread[ ] evil, whether of a physical, moral or economic nature." *National Ass'n of Home Builders*, 130 F.3d at 1048 (quoting *North Am. Co. v. S.E.C.*, 327 U.S. 686, 705 (1946). Congress is therefore empowered by its authority to regulate the channels of interstate commerce to prevent the taking of endangered species in cases like this where the pressures of interstate commerce place the existence of species in peril. *Id.*

b. Substantially Affects Interstate Commerce

There is no question that Congress is able to regulate noncommercial, interstate activity that substantially affects interstate commerce. *Bird*, 124 F.3d at 676. However, where a statute has no jurisdictional nexus, a greater showing is required than (1) the statute prohibits a class of activities and (2) when viewed in the aggregate, these activities may substantially affect interstate commerce in some broad and general sense. *Id.* at 677. In the absence of a jurisdictional element, a limiting principle is required, which identifies "judicially enforceable outer limits" to Congress' exercise of power under the Commerce Clause. *Id.* A limiting principle is something that relevantly ties the separate incidents and their effects on interstate commerce together. *See Bird*, 124

F.3d at 677 (citing *Wickard*, 317 U.S. at 128 (offering, as a limiting principle, the national wheat market); *Perez*, 402 U.S. at 156 (national market for commercial credit was limiting principle); *United States v Lopez*, 2 F.3d at 1351, 1367 n.51 (5th Cir. 1993) (noting "fungible and untraceable" characteristic of narcotics — which Congress found made federal regulation of intra state trafficking an operationally necessary prerequisite to effective regulation of the inter state activity — was a tying feature) (citations omitted), *aff'd* 514 U.S. 549 (1995)); *Bird*, 124 F.3d at 678 (presence of national commercial market in abortion-related services, together with the effects on such market of the proscribed conduct, was limiting principle).

i Limiting Principle: Potential for Future Commerce Related to Genetic Diversity such that the Regulated Activity Substantially Affects Interstate Commerce

Unlike the statute at issue in *Robinson*, the take provision of the ESA contains no jurisdictional element which would ensure, through case-by-case inquiry, that the take of the endangered species in question affects interstate commerce. 16 U.S.C. § 1538(a)(1)(B) (1985). In contrast, jurisdictional elements *are* present in other ESA sections (§ 9(a)(1)(E) and § 9(a)(1)(F)). The statute states, in relevant part:

> (1) . . . with respect to any [listed] endangered species of fish or wildlife . . . it is unlawful for any person . . . to — . . .
>
> (B) take any such species into, or export any such species from the United States;
>
> . . .

> (E) deliver, receive, carry, transport, or ship, *in interstate or foreign commerce*, any such species and in the course of a commercial activity, any such species:
> (F) sell or offer for sale in interstate or foreign commerce any such species; . . .

16 U.S.C. § 1538(a)(1)(B), (E), (F) (1985) (emphasis supplied). Consequently, the Court's inquiry must determine whether the take provision of the ESA proscribes intrastate activity that has (or might have) a substantial effect on interstate commerce *and* whether there is the potential for future commerce related to genetic diversity such that the regulated activity substantially affects interstate commerce. *See National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1051 (D.C. Cir. 1997). In other words, Congress must have divined the potential for a national market in endangered species of wildlife which could potentially result in trading and marketing of that species for its commercial value and because of the value of its gene material. *Cf. Bird*, 124 F.3d at 677 (requiring finding that Congress divined the existence of a national commercial market in abortion-related services in which the reduction of services in one state substantially affects the ability of clinics in other states to provide such services, and examining legislative history for support of such limiting principle).

One of the primary reasons that Congress sought to protect endangered species from "takings" was the importance of the continuing availability of a wide variety of species to interstate commerce. *National Ass'n of Home*

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Builders, 130 F.3d at 1050. *National Ass'n of Home Builders* sets forth Committee Reports on the ESA which recognize the potential for future commerce related to genetic diversity:

> As the House Report explained:
>
> > . . . As we homogenize the habitats in which those plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their — and our own — genetic heritage. The value of this genetic heritage is, quite literally, incalculable. . . .
> >
> > From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.
> >
> > . . .
> >
> > Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being [sic] those potential cures by eliminating those plants for all time? Sheer self interest impels us to be

cautious. H.R.REP. No. 93-412, at 4-5 (1973). Similarly, the Senate Report on the precursor to the ESA, noted:

> . . . From a pragmatic point of view, the protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels in a very brief span of time. Potentially more important, however, is the fact that with each species we eliminate, we reduce the [genetic] pool . . . available for use by man in future years. Since each living species and subspecies has developed in a unique way to adapt itself to the difficulty of living in the world's environment, as a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminant, is also irretrievably lost.
>
> S.REP. NO. 91-526, at 3 (1969).

National Ass'n of *Home Builders*, 130 F.3d at 1050-51. In light of the potential for future commerce related to genetic diversity recognized by Congress, this Court holds that

Congress was justified in concluding that the regulation of takes by § 9(a)(1)(B) of the ESA — an intrastate activity (in this case) prohibited by the Act — was necessary to ensure the future availability of endangered species with commercial value for exploitation and for genetic benefits, *See Bird*, 124 F.3d at 678 (analogous conclusion with respect to abortion-related services in national commercial market).

ii. The Balance of the "Substantial Effects" Analysis.

In evaluating Commerce Clause challenges to federal statutes, this Court must determine that there was a rational basis for Congress' conclusion that a regulated activity substantially affects interstate commerce. *National Ass'n of Home Builders*, 130 F.3d at 1051; *Knutson*, 113 F.3d 27, 29 (requiring court to analyze the take provision of the ESA under the "substantial effect" category of *Lopez* to determine whether "a rational basis existed for concluding that [the] regulated activity sufficiently affected interstate commerce.") The Court must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding. *Hodel*, 452 U.S. at 276.

First, this Court will examine the value of biodiversity in light of the previously mentioned congressional findings on its potential for future commerce. As the legislative history of the ESA suggests, enforcement of the take provision can ultimately result in future trade in endangered species for exploitation and harvesting of such species for gene benefits. Congress had the renewal of trade in mind when it enacted the ESA. *Gibbs*, 2000 WL 793941, at *9. The court in

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National Ass'n of *Home Builders* addressed the relationship between endangered species and biodiversity and the resultant effect on interstate commerce as follows:

> Approximately 521 of the 1082 species in the United States currently designated as threatened or endangered are found in only one state. . . . The elimination of all or even some of these endangered species would have a staggering effect on biodiversity — defined as the presence of a large number of species of animals and plants — in the United States and, thereby, on the current and future interstate commerce that relies on the availability of a diverse array of species.
>
> The variety of plants and animals in this country are, in a sense, a natural resource that commercial actors can use to produce marketable products. In the most narrow view of economic value, endangered plants and animals are valuable as sources of medicine and genes. Fifty percent of the most frequently prescribed medicines are derived from wild plant and animal species. Such medicines were estimated in 1983 to be worth over $15 billion a year. . . . In addition, the genetic material of wild species of plants and animals is inbred into domestic crops and animals to improve their commercial value and productivity.

National Assn of Home Builders, 130 F.3d at 1052-53 (citations omitted). Each time a species becomes extinct, the pool of wild species diminishes. *Id.* at 1053. This, in turn,

has a substantial affect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes. *Id.* at 1053.

Next, Congressional findings also suggest that the taking of the Edwards species can be regulated by Congress as an activity that substantially affects interstate commerced because it is the product of destructive interstate competition. Prevention of destructive interstate competition is a traditional role for congressional action under the commerce clause. *Id.* at 1055-56 (citing *Hodel*, 452 U.S. 264). This Court unqualifiedly adopts the analysis of this issue set forth in *National Ass'n of Home Builders*, 130 F.3d at 1055 (analogizing treatment of the regulation of destruction of endangered species to the ESA to regulation of destruction of the natural landscape under the Surface Mining Act).

The ESA regulates activities — destruction of endangered species and destruction of the natural landscape — that are carried out entirely within a State and which are not themselves commercial in character. *Id.* The activities, however, may be regulated because they have destructive effects on environmental quality that are likely to affect more than one State. *Id.* Section 9(a)(1) of the ESA was adopted to ensure that "growth and development" would not be at the expense of the conservation and protection of a variety of species, injury to which would have equally deleterious consequences for interstate commerce. *Id.* at 1056 (quoting H.R. 37 ("Endangered and Threatened Species Conservation Act of 1973") (Findings, Purpose, and Policy), reprinted at 119 CONG. REC. 25,694, 25,694 (1973)).

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The case at bar involves a regulation of the conditions under which economic activity takes place. Congress passed the ESA in part to prevent states from gaining a competitive advantage by enacting lower regulatory standards than other states. *National Ass'n of Home Builders*, 130 F.3d at 1056. Congress was aware that no state could be expected to require significantly more endangered species protection than other states, because for each individual state, the cost of preserving a species outweighs the benefits even though in aggregate, the benefits of biodiversity outweigh the costs. *Id.* This reason for passing the ESA is recognized in the ESA's legislative history:

> In its Declaration of Policy, the Senate stated as follows:
>
> . . . The Congress finds and declares that —
>
> (1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
>
> . . . .
>
> (5) encouraging the States, through Federal financial assistance and a system of incentives, to develop and maintain conservation, protection, restoration, and propagation programs which meet national and international standards is a key to

> meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish and wildlife.
>
> S.1983 ("Endangered Species Act of 1973") (Declaration of Policy), reprinted at 119 CONG. REC. 30,157, 30,157 (1973).

National Ass'n of Home Builders, 130 F.3d at 1056 n.20. Similarly, the House stated in its declaration of findings, purpose, and policy:

> . . . The Congress finds and declares that one of the unfortunate consequences of growth and development in the United States and elsewhere has been the extermination of some species or subspecies of fish, wildlife, and plants; that serious losses in species of wild animals with educational, historical, recreational, and scientific value have occurred and are occurring . . .; that a key to more effective protection and management of native fish and wildlife that are endangered or threatened is to encourage and assist the States in developing programs for such fish and wildlife; and that the conservation, protection, restoration, or propagation of such species will inure to the benefit of all citizens.
>
> H.R. 37 ("Endangered and Threatened Species Conservation Act of 1973") (Findings, Purpose, and Policy), reprinted at 119 CONG. REC. 25,694, 25,694 (1973).

National Ass'n of Home Builders, 130 F.3d at 1056 n.20. Congress has the power under the Commerce Clause to prevent destructive interstate competition that will result in the destruction of endangered species. *Id.* at 1057. The activity at issue may be regulated because it is likely to have destructive effects on interstate commerce. *Id.* at 1056.

To complete the "substantial effect" analysis, the Court examines whether it is reasonable that the take provision regulates intrastate activity that has (or might have) a substantial effect on interstate commerce. A class of activities can substantially affect interstate commerce regardless whether the activity at issue — in this case the taking of endangered species — is commercial or non-commercial. *National Ass'n of Home Builders*, 130 F.3d at 1049. *See also Bird*, 124 F.3d at 669-70 (upholding the Freedom of Access to Clinic Entrances Act against a constitutional challenge, based on allegedly impermissible exercise of Congress' Commerce Clause power, because it proscribes intrastate, noncommercial activity and holding that statute was proper exercise of such power because it had substantial effect on interstate commerce). Schuehle argues that the regulated activity at issue is not "commercial" in nature. However, the proper test of whether an activity can be regulated under the Commerce Clause is not whether the activity is itself commercial or economic but rather whether the activity has a substantial effect on interstate commerce. *National Ass'n of Home Builders*, 130 F.3d at 1050.

In those cases where the Supreme Court has sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the

activity in question has been some sort of economic endeavor. *Morrison*, 120 S. Ct. at 1750. To establish a sufficient tie to interstate commerce to come within Congress' authority, the taking of the Edwards species must be, in some sense, economic activity. *See Morrison*, 120 S. Ct. at 1744.

The take provision of the ESA is distinguishable from the statutes at issue in *Lopez* (Gun-Free School Zones Act) and *Morrison* (Violence Against Women Act) in that the latter two statutes involved activity that was noneconomic and only tenuously linked to interstate commerce. *Gibbs*, 2000 WL 793941, at *7 (citing *Morrison*, 120 S. Ct. at 1751). Here, however, water irrigation of crops to maintain an economic livelihood is a primary reason to subject oneself to the peril of the take provision. There is an ample factual basis to suggest a direct relationship between takings of the Edwards species and interstate commerce.

First, groundwater is an article of interstate commerce groundwater and is therefore subject to congressional regulations. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 953 (1982) (invalidating Nebraska statute limiting the use of Nebraska ground water in adjoining states); *Old Coach Development Corp., Inc. v. Tanzman*, 881 F.2d 1227, 1232 (3d Cir. 1989). The power to regulate commerce includes the power to regulate practices affecting the prices at which commodities in that commerce are dealt. *Wickard*, 317 U.S. at 128. Regulation of water use affects the price and market conditions of both the crops raised using irrigation water and the water itself. Thus, regulation of pumping activities, although conducted intrastate, would have a substantial effect on the supply curve for such commodities (agricultural

products and water) and the price at which they could be sold. Therefore, the taking of Edwards species is connected to interstate markets for agricultural products and water. *See, generally*, *Gibbs*, 2000 WL 793941, at * 10-11.

The second nexus between the take provision and interstate commerce is tourism. Persons travel from other states and nations to observe the Edwards species at Aquarena Springs in San Marcos and at San Marcos and Comal Springs. Aquarena Springs attracts interstate tourism by advertising the Edwards species to those traveling the interstate highways. Regulation of takes of the species is necessary to conserve a large enough quantity of the species to sustain tourism. *See Gibbs*, 2000 WL 793941, at *8.

Finally, the regulation of Edwards species takings is closely related to the interstate market for scientific research. Out of state scientists visit the San Marcos Fish Hatchery, home to endangered fountain darters and the Texas blind salamander. The University of Texas hosts field trips for visiting out of state and foreign professors to observe the species. Fountain darters are maintained and displayed at the Dallas Zoo/Dallas Aquarium. Scientific research generates jobs, deepens our knowledge of the world, and can reveal alternate uses for animals. *Gibbs*, 2000 WL793941, at *9. Scientific research on the Edwards species may also discover how to use the species' distinctive gene material to improve domestic animals or to increase a human's resistance to disease or environmental contaminants. Protection of the Edwards species thus encourages further research that may have inestimable future value, both for scientific knowledge as well as commercial development of the Edwards species.

Cf. id. (asserting this conclusion regarding the protection of endangered red wolves on private land). Schuehle argues that the ESA disclaims scientific research as not being commercial, relying on the ESA's definition of "commercial activity:" Commercial activity is defined in the Act as "all activities of industry and trade, including, but not limited to, the buying and selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That *it does not include exhibition of commodities by museums or similar cultural or historical organizations*." 16 U.S.C. § 1532 (1985) (emphasis supplied). Schuehle misses the point, however. Scientific research, especially involving interstate travel, falls under the auspices of the commerce clause in this instance, not because it is commercial activity itself, but because it is affected by the government's regulation of Edwards pumping, an economic activity. *Compare with Morrison*, 120 S. Ct. 1740, 1750 (noting that the noneconomic, criminal nature of the conduct at issue in *Lopez* was central to that court's decision, as the Gun-Free School Zones Act did not regulate a commercial activity, but recognizing that *Wickard* — where wheat was produced and consumed intrastate but not bought or sold — did involve economic activity).

Congressional findings on the effect of biodiversity on interstate commerce and the adverse effects of interstate competition enable this Court "to evaluate the legislative judgment that the activity in question substantially affected interstate commerce." *See Knutson*, 113 F.3d at 29. Congress could rationally conclude that the intrastate activity regulated by section 9 of the ESA substantially affects interstate commerce for two primary reasons: First, the provision

prevents the destruction of biodiversity and thereby protects the current and future interstate commerce that relies upon it. Second, the provision controls adverse effects of interstate competition. *National Ass'n* of *Home Builders*, 130 F.3d at 1051.

Further, a rational basis is "visible to the naked eye," because of the relationship of tourism, scientific research, and the commodities of water and crops to interstate commerce. *See Knutson*, 113 F.3d at 29. Because the activities proscribed by the ESA's take provision fall within the categories of activity that Congress may regulate under the Commerce Clause, the take provision is constitutional as applied to Schuehle.

III. Regulation of the Edwards Species pursuant to Congress' Treaty Power

In addition to upholding the ESA's take provision under the Commerce Clause, this Court may independently uphold ESA provisions, including the take provision, under the Article I, Section 8 Necessary and Proper Clause and the Article II treaty-making power. Treaties made by the United States are the supreme law of the land under Article VI, and that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *United States v. Bramble*, 103 F.3d 1475, 1480 (9th Cir. 1996) (upholding the Migratory Bird Treaty Act under the Necessary and Proper Clause and Congress's treaty-making power) (quoting *Missouri v. Holland*, 252 U.S. 416 (1920)).

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The Endangered Species Act recites that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to" several listed treaties and "other international agreements," *Palila*, 471 F. Supp. at 993 (citing 16 U.S.C. § 1531(a)(4)). Among the listed treaties is the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere.[11] *Id.*; 16 U.S.C.A. § 1531(a)(4)(C) (1985 & Supp. 2000). The ESA further identifies its purpose as "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the [listed] treaties and conventions." 16 U.S.C.A. § 1531(b) (1985). The Western Hemisphere Convention includes provisions stating that it shall provide protection to "all species and genera of . . . native, flora and fauna, . . . in sufficient numbers and over areas extensive enough to assure them from becoming extinct through any agency within man's control," and that signatories "agree to adopt, or to propose such adoption to their respective appropriate lawmaking bodies, suitable laws and regulations for the protection and preservation of flora and fauna within their natural boundaries, but not included in the national parks, national reserves, nature monuments or strict wilderness reserves." 56 Stat, at 1356, 1362; *Palila*, 471 F. Supp. at 993. Given the findings and purposes of the ESA and the

11. Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, October 12, 1940, United States – Other American Republics. 56 Stat. 1354, T.S. No. 981.

provisions of the Western Hemisphere Convention, there can be no dispute about the validity of the statute (implementing the treaty) under Article 1, § 8. as a necessary and proper means to execute the powers of the Government." *See id.* (finding that Congress was empowered to enact the ESA, which implements the Western Hemisphere Convention, a valid treaty) (quoting *Holland*, 252 U.S. at 432) (drawing same conclusion with respect to the Migratory Bird Treaty Act).

IV. Sierra Club's "Exercise of Power" as it Affects Due Process

Schuehle claims that he was deprived of his due process rights under the Fourteenth Amendment to the United States Constitution redressable through 42 U.S.C. § 1983. Schuehle challenges the constitutionality of the ESA's citizenship provision, asserting that Congress has unconstitutionally delegated legislative power by allowing any citizen to sue.

Under 42 U.S.C. § 1983, any person who is deprived 'of any rights, privileges, or immunities secured by the Constitution and laws,' by any person acting under color of state law, may bring a private action to seek redress. Schuehle does not have a claim under 42 U.S.C. § 1983 because if the Sierra Club indeed acted under color of law, it was federal law, not state law. Therefore, its actions do not form the basis of a § 1983 claim. Furthermore, Schuehle does not have a Fourteenth Amendment claim because the Fourteenth Amendment applies to the states, not to the federal government.

Additionally, Schuehle is foreclosed from bringing a suit under 42 U.S.C. § 1983 because of the comprehensive enforcement scheme of the ESA. When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 673, n.2 (1979) (Stewart, J., dissenting) (when "a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983") The ESA does provide a comprehensive enforcement mechanism in the form of a citizen suit provision. Congress undoubtedly did not intend to preserve the § 1983 right of action when it created such a specific statutory remedy. *See id.* The existence of this express remedy demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983, *See id.* Thus, even if the Sierra Club were a state actor, Schuehle's § 1983 claim would fail.

Moreover, even if Schuehle had based his claim on more fertile legal grounds than § 1983 and the Fourteenth Amendment, it is doubtful that he could have prevailed. Almost all environmental statutes contain citizen suit provisions that allow any person to act as a private attorney general to enforce government regulations. Other major environmental laws with citizen suit provisions include: Toxic Substances Control Act, 15 U.S.C. § 2619 (1998);

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Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544m(b)(2) (Supp. 2000); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(a) (1986); Clean Water Act, 33 U.S.C. § 1365 (1986 and Supp. 2000); Deepwater Port Act, 33 U.S.C. § 1515 (1986); Act To Prevent Pollution of Ships, 33 U.S.C. § 1910 (1986); Safe Drinking Water Act 42 U.S.C. § 300j- 8 (Supp. 2000); Noise Control Act, 42 U.S.C. § 4911 (1995); Energy Policy and Conservation Act, 42 U.S.C. § 6305 (1995); Resources Conservation and Recovery Act, 42 U.S.C. § 6972 (1995); Clean Air Act, 42 U.S.C. § 7604 (1995); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (1995); and Submerged Lands Act, 43 U.S.C. § 1349 (1986).

The Supreme Court has decided multiple citizen suit cases and, although it did not specifically address the constitutionality of these provisions under the separation of powers principle, it has never suggested that citizen suit provisions may be unconstitutional, *See, e.g.*, *Friends of the Earth v. Laidlaw Environmental Servs., Inc.*, __U.S. __, 120 S. Ct. 693 (2000); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *National Sea Clammers*, 453 U.S. 1.

Under 16 U.S.C.A. § 1540(g)(1), Congress authorized citizen suits against any person who is alleged to be in violation of the provisions of the ESA. This statute provides:

> (g) Citizen Suits
> (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf —

> (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permuted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof;
> . . .

16 U.S.C.A. § 1540(g)(1) (1985). The citizen suit provision limits a citizen's authority to carry out an enforcement action to instances when government authorities decline to act, however. According to the citizen suit provision, a person may not proceed with a suit until 60 days after he files a notice of the violation with the Secretary of the Interior end the alleged violator. 16 U.S.C.A. § 1540(g)(2)(A)(i) (1985). Furthermore, a person may not proceed with his suit if the Secretary commences civil proceedings or a criminal action based on the alleged violation. 16 U.S.C.A. § 1540(g)(2)(A)(ii), (iii) (1985).

Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner. *Dovis v. Passman*, 442 U.S. 228, 241 (1979). Thus, Congress may expand individual rights by express legislation, by adding a citizen suit provision to public law. Here, the citizen suit provision of the ESA provides clear evidence that Congress wanted to recognize a private right of action in the absence of the Secretary's own initiative to act. This Court is not oblivious to the longstanding controversy regarding the delegation of enforcement power to third parties, as summarized by Professors Barry Boyer and Errol Meidinger:

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> Private delegations of enforcement power may be as suspect as private delegations of rulemaking authority because they bypass the existing structure of limited authority and political accountability that confines the powers of the regulatory state. . . . — [On the other hand, t]o the extent that regulation serves "the people" rather than "the industry" or "the bureaucrats," it gains legitimacy. Conversely, it forfeits that legitimacy when it becomes captive to the will of the industries or bureaucrats. From this perspective, private enforcement may be viewed as the ultimate legitimating device, since it gives the effective power to initiate regulation back to the people themselves.

Eileen Gauna, *Federal Environmental Citizen Suit Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 87 (1995) (citation omitted). However, Congress understood that there would be undesirable underenforcement of environmental laws because of limited regulatory resources — that is why it equipped many federal environmental laws with citizen suit provisions. *Id.* at 40. This Court casts its lot with those who argue that the citizen suit is a legitimate means by which the people themselves can initiate regulation when the existing authorities elect not to do so. Thus, the ESA citizen suit provision does not represent an unlawful delegation of rulemaking authority.

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CONCLUSION

The Endangered Species Act is a valid exercise of Congressional power pursuant to the treaty-making power and the Commerce Clause of the United States Constitution. The citizen provision of the ESA does not impermissibly delegate legislative power to the Sierra Club, a private entity. Accordingly,

IT IS ORDERED that Plaintiff Hunter Schuehle's Motion for Summary Judgment is hereby **DENIED**.

IT IS FURTHER ORDERED that Federal Defendants' Motion for Summary Judgment is hereby **GRANTED** on the merits.

IT IS FINALLY ORDERED that Defendant Sierra Club's Motion for Summary Judgment is also hereby **GRANTED** on the merits.

SIGNED this 11 day of July, 2000.

s/ Lucius D. Bunton
Lucius D. Bunton, III
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 1, 2002

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-50839

JOHN H. SHIELDS; HUNTER SCHUEHLE

Plaintiffs - Appellants

v.

GALE NORTON, Secretary, United States Department of Interior; JAMIE RAPPAPORT CLARK, Director, United States Fish & Wildlife Service; SIERRA CLUB

Defendants - Appellees

Appeal from the United States District Court for the Western District of Texas, Midland

ON PETITION FOR REHEARING

Before JOLLY, HIGGINBOTHAM, and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge